

NO. PD-1299-16

IN THE TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
3/8/2017
ABEL ACOSTA, CLERK

**STATE OF TEXAS,
PETITIONER**

VS.

**KIMBERLY FORD,
RESPONDENT**

ON PDR FROM THE 13TH COURT OF APPEALS

RESPONDENT'S BRIEF

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Appeal: Irma M. Sanjines

4. Trial Judge: The Hon. Angelica Hernandez

5. Presiding Judge: The Hon. Jack Pulcher, 105th District Court

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STATEMENT OF THE CASE

Respondent (Ford) was charged in an Indictment with Possession of Methamphetamine less than four grams, a third degree felony.

Ford filed a Motion to Suppress which had been reset twice prior to its final setting of December 10, 2014. The trial court granted the Motion to Suppress on that date. (CR 29)(2RR p. 20). The State filed a timely notice of appeal.

The Thirteenth Court of Appeals affirmed the trial court's order granting the motion to suppress. The State filed a motion for rehearing which was denied on October 12, 2016. The State petitioned this Court for discretionary review which was granted. The State filed their Petitioner's Brief on February 6, 2017. Respondent was granted extension of time to file their brief.

ISSUES PRESENTED

1. Whether the officer had reasonable suspicion to detain Ford based upon speculative facts given by the store employee.
2. Whether the officer lacked probable cause to arrest Ford based upon an absence of an attempted walkout coupled with Ford's statement that she intended to pay for the items and wasn't through shopping?

STATEMENT OF FACTS

At the Motion to Suppress, the State's evidence was an unsworn police report prepared by Police Officer Rogers which states that he responded to an Dollar General employee phone call about a theft in progress. Upon arrival, the employee advised him that at the north east corner of the store was a shopper who had entered the store with an empty purse and was filling it with store merchandise and had covered the purse a blue jacket. The employee described the shopper and Officer Rogers approached her at the back of the store. Ford made no attempt to leave the store and instead asked the police officer, "Can I help you?" The officer engaged her into a conversation, telling her she was reported for suspected shoplifting. She replied, that she had just put them in her purse, she was not done shopping, and she was going to pay for them before she left. The officer took her purse and opened it and he stated he found it full of store merchandise. (3 RR, Exhibit Volume) The officer removed the store merchandise and found underneath six small bags of methamphetamine. Ford was arrested.

The trial court went into a colloquy regarding the totality of circumstances surrounding the arrest and subsequent search of Ford's purse. (2RR pp. 15-21). First, the trial court expressed concern as to the credibility of the information contained in the police report since Rogers' actions was based upon hearsay of

Maria Molina, the informant, who was not available to the trial court. The trial judge stated, “There’s no one here to vouch for the credibility of the information. There is Maria Molina who is an employee of the store who allegedly called [the police] and gave some information. But, the defendant was still shopping. . . .” (2 RR p. 19).

The trial court also questioned Rogers’ reasoning for probable cause to arrest and search Ford, Rogers stating in his report that he believed that Ford had the intent to steal because she “was depriving the store from displaying the items for sale”. The trial court did not believe this was enough to form probable cause to arrest when one considered that Ford had just told Rogers “she was not done shopping, and she was going to pay for them before she left....” (3RR, Exhibit 1 at 18)(2RR p.19). The trial court stated, “I don’t know an offense associated with not allowing items to be displayed for sale. He [Rogers] doesn’t say anything about theft, other than at the very end when says it was obvious to, I guess to him, that Ford had intentions to steal the items. But she never tried to leave the store with the items, she didn’t flee when she was approached. She didn’t try to further hide anything, and she indicated that she was going to pay for them”. (2RR p. 19).

The State argued that “asportation” of the items was not required to prove theft pursuant to *Hawkins*, 214 S.W. 3d 668. The trial court perused *Hawkins* and

then distinguished it from Ford's circumstances by saying "In *Hawkins* you have other factors. You have being there when the business isn't open. You have climbing a fence. You have fleeing the scene upon contact. You have a lot of factors that the court could have rightfully taken into consideration for purposes of, you know, determining the intent, meaning, you know, there was an intent to deprive." (2RR p. 17). The defense counsel argued that the case differentiated from Ford's circumstances in that she was a customer who was inside the store during business hours, shopping, and telling the officer she was still shopping and was going to pay for them. (2 RR p. 16).

The trial court granted the suppression, concluding that the officer acted prematurely in contacting Ford in the middle of the store and asking about the items she placed in the purse because "the circumstances left a huge gap for the court to infer and determine what her intention was. And I think that's just a too big a leap at this point, considering her cooperation...." (2 RR p. 20). The trial court found the officer lacked reasonable suspicion to detain Ford at the hearing when it stated, "the officer did not have sufficient basis to stop and investigate Ford for theft." (2 RR p. 20).

ISSUES PRESENTED

1. Whether the officer had reasonable suspicion to detain Ford based upon speculative facts given by store employee.
2. Whether the officer lacked probable cause to arrest Ford based upon an absence of walkout coupled with statement that she intended to pay for the items?

SUMMARY OF THE ARGUMENT

1. The officer did not have reasonable suspicion to detain Ford.

The trial court found that Officer Rogers did not have reasonable suspicion to detain Ford from a totality of the circumstances. (2 RR p. 20). It is presumed that the trial court so found due to the lack of credibility of the employee who called the police and gave sketchy, speculative facts to the officer to support the detention. (CR p. 18) (RR p. 19) Moreover, the facts of the police report reflect that Ford was still shopping, with a cart and items in that cart, and had not passed nor was she attempting to pass a purchase point in the store at the time of the officer's arrival. Ford had not yet violated the law or done anything unlawful and therefore her detention was illegal. The officer did not have articulable facts that criminal activity was afoot. Therefore, Officer Rogers actions at his arrival to stop and question Ford were premature. Ford yielded to Officer Roger's show of authority when he stopped her and therefore was not consensual.

The police report presents a question of Maria Molina's, the informant's, credibility. It states that Molina told Officer Rogers the customer (Ford) had come in with a empty purse and was filling it. (CR p. 18) Maria Molina would have to be clairvoyant to know that Ford's purse was empty and in fact was filled with only store items. Moreover, Ford had items in her shopping cart that she would have paid for if not for Molina's and Officer Rogers' intrusion, and yet those items were totaled up by Molina to add to the value of the stolen items in this criminal case. The trial court felt that Molina's testimony at the suppression hearing was essential as Officer Rogers relied on her information to form a suspicion and probable cause of Ford's unlawful behavior. Moreover, cross-examination of Molina was essential on the issues going to her credibility as an informant. The trial court's findings that officer lacked reasonable suspicion to believe Defendant had committed a crime at the time of the stop should be upheld. (CR pp. 39, 48).

Public policy would be better served if the store had waited for the shopper, Ford, to approach a point of sale, fail to pay for the merchandise, and then apprehend the shoplifter as she attempted to leave the store. In this situation, the intent to steal would be evident and meet the reasonable suspicion test to detain.

2. The officer lacked probable cause to arrest Ford.

Officer Rogers states in his report that Ford explained to him or told him

during her detention that she had just put the items in her purse, she was not done shopping, and she was going to pay for them before she left. If the items were small enough to fit into Ford's purse, then it was reasonable for her to have placed them in her purse and not in the cart where they would fall through the holes in a cart. The officer failed to advise her that he was going to search her purse. He merely grabbed the purse and began to search. It was clearly visible that she had items in her cart, perhaps larger items that would not fall through the cracks in a shopping cart. He reports that she lacked nervousness when he approached her. At this point, Officer Rogers, having received an explanation from Ford as to her actions, did not have probable cause to search and arrest Ford for an unlawful act since it was not clear that she did not have the specific intent to steal the items at the point of his encounter with her. The trial court should be upheld in its findings that the officer did not have probable cause to arrest Defendant. (CR pp. 39, 48)

Officer Rogers arrested Ford for depriving the store from displaying the items for sale. This is not a criminal offense. Once Ford gave her explanation as to her activity, she should have been cleared and released from her detention. Because the seizure of the methamphetamine was not incident to a lawful arrest, it was improper and needed to be suppressed by the trial court. The trial court's findings that probable cause did not exist to search Defendant's purse should be

upheld. (CR pp. 39, 48).

Standard of Review

In reviewing a trial court's ruling on a motion to suppress, this Court must apply a bifurcated standard of review, giving almost total deference to a trial court's determination of historic facts and mixed questions of law and fact that rely upon the credibility of a witness, but applying a *de novo* standard of review to pure questions of law and mixed questions that do not depend on the credibility determinations. *Martinez v. State*, 348 S.W.3d 919, 922-23 (Tex. Crim. App. 2011).

In a suppression hearing, the trial court is the sole trier of fact and credibility of witnesses and its weight to be given, such that he may believe or disbelieve all or any part of a witness' testimony, even if that testimony is not controverted by any other witness. *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000). In considering the court's ruling, an appellate court must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Romero v. State*, 800 S.W. 2d 539, 543-544 (Tex.Crim.App. 1990).

Burden of Proof

The defendant has the initial burden of producing evidence that the police seized the defendant without a warrant. Once the defendant proves the seizure was made without a warrant, as in this case, the burden of proof then shifts to the State to prove probable cause for the arrest and the reasonableness of the seizure. *Sims v. State*, 980 S.W.2d 538 (Tex. App.–Beaumont 1998).

Reasonable Suspicion and Probable Cause

Reasonable suspicion of criminal activity permits a temporary seizure for questioning that is limited to the reason for the seizure. A police officer has reasonable suspicion for a detention if he has specific, articulable facts that, when combined with rational inferences, would lead the officer to reasonably conclude that the person detained is, has been, or soon will be engaged in criminal activity. This is an objective standard that disregards the actual subjective intent of the arresting officer and looks, instead, to whether there was an objectively justifiable basis for the detention. *Wade v. State*, 422 S.W. 3d 661 (Tex.Crim.App. 2013).

The test for probable cause for a warrantless arrest under Article 14.01(b) is whether at that moment the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrested person had committed or was

committing an offense. *Beverly v. State*, 792 S.W. 2d 103, 104-105 (Tex.Crim.App.1990).

An offense is deemed to have occurred within the presence or view of an officer when any of his senses afford him an awareness of its occurrence. *Clark v. State*, 117 Tex. Crim. 153, 35 S.W. 2d 420, 422 (1931). However, the information afforded to the officer by his senses must give the officer reason to believe that a particular suspect committed the offense. *Muniz v. State*, 851 S.W. 2d 238, 251 (Tex.Crim.App. 1993).

Theft

Theft is defined as the unlawful appropriation of property with intent to deprive the owner of the property. Tex. Penal Code Ann. § 31.03(a).

ARGUMENTS

1. The officer did not have reasonable suspicion to detain Ford.

A police officer has reasonable suspicion to detain if he has specific, articulable facts that, combined with rational inferences from those facts, would lead him reasonably to conclude that the person detained is, has been, or soon will be engaged in criminal activity. *Derichsweiler v. State*, 348 S.W.3d 906, 914 (Tex. Crim. App. 2011)(citing *Terry v. Ohio*, 392 U. S. 1, 21-22, 88 S.Ct. 1868(1968)). This is an objective standard that disregards any subjective intent of

the officer making the detention and looks solely to whether an objective basis for the detention exists. We look at only those facts known to the officer at the inception of the detention. *State v. Griffey*, 241 S.W.3d 700, 704((Tex. App. –Austin 2007, pet. ref’d). The factual basis for stopping a person need not arise from the officer’s personal observation , but may be supplied by information acquired from another person provided the facts are adequately corroborated by the officer, either through personal observation or through confirmation of enough facts reasonably to conclude the informant’s information is reliable. *Alabama v. White*, 496 U.S. 325, 330-31, 110 S.Ct. 2412, 2416-17, 110 L.Ed. 2d 301 (1990).

At the time Officer Rogers announced himself to Ford, he had seen no criminal activity by Ford. He spoke too briefly to Molina, the store employee and informant, to have known if the information was reliable. In fact, the officer could have realized that the information was less than reliable when the store employee stated that Ford had come in with an empty purse. The employee could not have known that unless she was clairvoyant. Moreover, the police officer could plainly see that Ford was still shopping at the back corner of the store, with a cart and items in that cart, and had not passed nor was she attempting to pass a purchase point in the store at the time of the officer’s arrival, and Ford did not attempt to run out of the store. The officer stated that when he approached Ford she did not

seem nervous. Ford engaged him in a conversation and replied to his query that she was going to pay for the items but was not done shopping. At this point, the police offer did not have articulable facts to proceed to grab Ford's purse and search the purse. Nothing else in the record indicates any actions or statements that Ford was attempting to appropriate the items with an intent to deprive Dollar General of the merchandise. There was an absence of an attempted walkout from the store or pushout by Ford against the officer.

Indeed, the trial court felt that Molina's testimony at the suppression hearing was essential as the officer had used it to form reasonable suspicion. It also believed that Molina's information was less than credible as restated by Officer Roger in his police report. The trial court's finding that the officer lacked reasonable suspicion to detain Ford should be upheld.

2. The officer lacked probable cause to arrest Ford.

Arrests require a warrant or probable cause. Probable cause exists when the facts and circumstances are such that it would excite a reasonable mind that the person was guilty of the crime of which he is charged with. *Akin v. Dahl*, 661 S.W. 2d 917, 921 (Tex. 1983), cert. denied, 466 U. S. 938, 80 L. Ed. 2d 460, 104 S. Ct. 1911 (1984).

The probable cause determination asks whether a reasonable person would

believe that a crime had been committed given the facts as the complainant honestly and reasonably believed them to be before the criminal proceedings were instituted. *Akin v. Dahl*, 661 S. W. 2d at 920-21. Whether probable cause is a question of law or a mixed question of law and fact depends on whether the parties dispute the underlying facts. When the facts underlying the defendant's decision to prosecute are disputed, the trier of facts, the court in this instance, must weigh evidence and resolve conflicts to determine if probable cause exists, as a mixed question of law and fact. When the facts are not contested, and there is no conflict in the evidence directed to that issue, the question of probable cause is a question of law which is to be decided by the court.

Officer Rogers states in his report that Ford explained to him or told him during her detention that she had just put the items in her purse, she was not done shopping, and she was going to pay for them before she left. It was clearly visible that she had items in her cart. He reports that she lacked nervousness when he approached her. She had not attempted to pass a cash register, and was in fact, still at the corner of the store which Molina had described. At this point, Officer Rogers, having received an explanation from Ford as to her actions, did not have probable cause to arrest Ford for an unlawful act since it was clear she did not have the specific intent to steal the items at the point of his encounter with her. A

person commits theft if he unlawfully appropriates property with intent to deprive the owner of the property. Tex. Penal Code Ann §31.03(a). Appropriation must be accompanied by the specific intent. *Thompson v. State*, 244 S.W. 3d 357 (Tex. App.-Tyler 2006). Officer Rogers states that he arrested her “because she was depriving the store from displaying the items for sale.” (3RR, Exhibit 1 at p. 18). The trial court believed that the officer arrested for a crime that doesn’t exist and is not part of the penal code. (2 RR p. 19). Moreover, even if theft as a crime was to be considered, the court found the officer’s actions to be premature. (2 RR p. 19). The trial court should be upheld in its findings that the officer did not have probable cause to arrest Defendant. (CR pp. 39, 48). It is not uncommon for shoppers to place small items such as lipsticks in their purse so as to prevent the item from falling through the large gaps in a shopping cart. It is not uncommon for a shopper to pull out a small item from their purse and declare it as they do a sales check-out. Public policy would be better served if Dollar General had waited for the shopper, Ford, to approach a point of sale, fail to pay for the merchandise, and then apprehend the shoplifter as she attempted to leave the store. In this circumstance, the intent to steal would be evident and the meet the burden of proof for theft.

Ford should have been released from detention after Ford offered an

explanation of her intent to pay for the store items, even the items in her purse. She should have been cleared at that point of any reasonable suspicion of theft the officer may have reasonably had.

Instead, Officer Rogers proceeded to arrest Ford for “depriving the store from displaying the items for sale”. This is not a criminal offense. Because the seizure of the methamphetamine was not incident to a lawful arrest by Tex. Code of Criminal Procedure Ann. art. 59.03, it was an improper seizure of the drug. An investigative stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop, i.e. probable cause for the crime charged. The stop cannot be used as a fishing expedition for unrelated criminal activity. *State v. Thirty Thousand Six Hundred Sixty Dollars*, 136 S.W.3d 392 (Tex. App.-Corpus Christi 2004). Ford, at the point that she stated she intended to pay for the items, had a privacy interest in the contents of her purse. There was no legitimate governmental interest in discovering weapons, for example, that overrode her expectation of privacy. *Stewart v. State*, 611 S.W. 2d 434 (Tex. Crim. App. 1981). The trial court’s findings that probable cause did not exist to search Defendant’s purse should be upheld. (CR pp. 39, 48).

PRAYER

For the foregoing, Respondent requests this Court to affirm the trial

court's ruling and for all other relief to which Respondent may be justly entitled to.

Respectfully submitted,

/s/ **Irma Sanjines**

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation because it contains 3, 591 words.

2. This brief complies with the typeface requirements because it has been prepared using WordPerfect X7 in Times New Roman 14 point font for text and 12 point font for footnotes, in standard 10 cpi typeface.

/s/ **Irma Sanjines**

Irma Mendoza Sanjines

CERTIFICATE OF SERVICE

I certify that on March 8, 2017 a copy of the foregoing was e-served to
Stacey.Soule@SPA.texas.gov and douglas.norman@nuecesco.com.

/s/ **Irma Sanjines**
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